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No.

Supreme Court, U.S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1988

JOHN ROE,
*Petitioner,*

VS.

CALIFORNIA SUPERIOR COURT, COUNTY OF MARIN,

SHERRY DOE,
*Real Party in Interest.*

**On Writ of Certiorari to the California Court of Appeal, First Appellate District, Division 4**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

(1) Whether California Evidence Code section 621, which creates a presumption regarding the paternity of a child based on the marital status of the mother at the time of birth, is unconstitutional as a violation of the Due Process Clause and/or Equal Protection Clause of the United States Constitution, when the mother brings a paternity action against a man who is not her husband, and when the child does not join in such action?

(2) Whether an order requiring a third party defendant to submit to paternity blood tests, when Evidence Code section 621 applies, constitutes a violation of the defendant's Constitutional right of privacy and freedom from unreasonable search and seizure?

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## PETITION FOR WRIT OF CERTIORARI

### DECISION BELOW

The decision of the California Court of Appeal, First District, Division 4, is reported in the advance sheets at 202 Cal. App. 3d 234, 248 Cal. Rptr. 669 and is set forth in the Appendix at A-1- 9. The order of the California Supreme Court denying Petitioner's Petition for Review, and ordering the Reporter of Decisions not to publish the Court of Appeal opinion, is set forth in the Appendix at A-10.

### JURISDICTION

The California Supreme Court denied Petitioner's timely Petition for Review on August 25, 1988. Petitioner invokes the Court's certiorari jurisdiction under 28 U.S.C. section 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Fourteenth Amendment, United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Evidence Code section 621:

> (a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
>
> (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
>
> (c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.
>
> (d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later

than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(e) The provisons of subdividion (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

(f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.

(g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.

## STATEMENT OF THE CASE

This case raises important issues concerning the constitutionality of California Evidence Code section 621, the same statute involved in *Michael H. and Victoria D. v. Gerald D.*, No. 87-746, which is presently before the Court. Petitioner ["John"] respectfully requests that the Court issue a writ of certiorari, to review this case in light of its adjudication of *Michael H.*

A. *Background.* On July 30, 1981 Respondent ["Sherry"] gave birth to a daughter, Sabrina. Sherry was then living with her husband, James, with whom she had another daughter two years earlier. Sherry and James had cohabited since their marriage in 1974, and they had continued to live together with the two girls in the summer of 1982. At that time, the parties separated, and Sherry assumed sole custody of the children.[1]

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[1] The Court of Appeal opinion states [Appendix A-3]: "John and Sherry lived together with her daughters at various times after James and Sherry separated. In October of 1983, John and Sherry commenced living together in a house that they selected together and John pur-

B. *Dissolution of Marriage.* James filed a petition for Dissolution of Marriage in Sonoma County on November 12, 1982. In the Petition he listed both girls as children of the marriage. Sherry's Response to the Petition, signed under penalty of perjury, also declared that both girls were children of the marriage.

James exercised regular visitation with both of the children, and he supported them financially, until October, 1983. Although the family was destablized by the separation, James and Sherry nonetheless treated both children equally. Thus, the children had two parents: a father (James) who paid money for their care, and a mother (Sherry) with whom they lived.

In October, 1983 Sherry decided to live together with John, who purchased a house for this purpose. Upon that occurrence, James unilaterally discontinued his contact with Sabrina and his monetary support for her. Sherry and James then met privately, and they agreed that James would permanently sever his relationship with Sabrina.

On November 15, 1983, after Sabrina was more than 2 years and 3 months old, Sherry and James executed a Marital Settle-

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chased. Although John had intended to marry Sherry, this never occurred and in March of 1985 Sherry moved to Arizona. John continued to assist her financially by sending her $2,750 per month until February of 1986. Sherry filed the present paternity action a few months thereafter."

The Court of Appeal's statement may possibly leave the impressison that John cohabited with Sherry and Sabrina for many years. In fact, they lived together only 3 months. Moreover, the facts which the Court of Appeal recited do not constitute proof that John is Sabrina's natural father, much less do they change the matter of legal parentage, which Evidence Code section 621 settles. All of these events took place after Sabrina was over two years old. Moreover, it would well have been possible for John to live with Sherry and care for Sabrina without being Sabrina's father.

In any event, as John will discuss, the trial court (Breiner, J.) found, following an evidentiary hearing, that John was not estopped by his conduct to assert Evidence Code section 621. Thus, no inference exists that John was responsbile for Sherry's failure to file a motion for blood tests under Evidence Code section 621.

ment Agreement which provided that James was *not* the "natural" father of Sabrina. In implicit recognition that James nonetheless remained Sabrina's legal father, the Agreement further provided that James would give his consent to a stepparent adoption of the child. The Agreement also stated that James would have no obligation to pay child support for Sabrina. The parties incorporated the Marital Settlement Agreement into an Interlocutory Judgment of Dissolution of Marriage, entered on December 2, 1983.

John and Sherry remained together in the same household for only three months, and they separated in January, 1984. Over a year later, in March, 1985, Sherry moved from California to Arizona.

C. *Paternity action.* On May 30, 1986, when Sabrina was nearly five years old, Sherry filed the instant paternity action, in which she named John as the father of Sabrina. She also filed an order to show cause, to require John to submit to paternity blood tests and to pay child support. In response, John denied that he was Sabrina's father and asserted as an affirmative defense the presumption of California Evidence Code section 621, quoted earlier in this petition.

The trial court heard Sherry's order to show cause on June 18, 1986. The trial judge (Broderick, J.) found that Evidence Code section 621 applied, and he ordered a separate evidentiary hearing on whether or not John was estopped by his conduct to assert the statute.[2]

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[2] Among other rulings, Judge Broderick made the following finding: "Clearly, Evidence Code section 621 applies here and Sabrina is conclusively presumed to be the child of Plaintiff's earlier marriage, two years having elapsed since the child's birth. This is true even though the presumed father has successfully rebutted the presumption by blood test evidence within the two-year period permitted by the statute for that purpose.

"Plaintiff seeks to avoid the operation of the statute by a contention that Defendant is estopped by his conduct to assert that defense. Allegations supporting Plaintiff's estoppel contention are sparse; indeed, if she hadn't made the ambiguous allegation that the Defendant 'has

D. *Estoppel hearing.* The separate hearing on the issue of estoppel took place before another judge (Breiner, J.). Judge Breiner ruled that Sherry had failed to meet her burden to establish that John was estopped to raise the conclusive presumption. On his own initiative, however, the judge also ruled that Sherry maintained the right to demonstrate that application of Evidence Code section 621 might violate *Sabrina's* rights of Due Process of Law and Equal Protection.[3]

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held himself out as [Sabrina's] father', there would be no support for the proposition whatsoever. From the memoranda and supporting declaration it appeared that there is a substantial controversy surrounding the facts upon which Plaintiff bases her claim of estoppel. If the Defendant is not estopped to assert the two-year limitation, the motion for blood test should be denied, and in fact the entire proceeding should be dismissed."

The trial court's statement that James had rebutted the presumption is incorrect. Also incorrect is the Court of Appeal's statement that "[p]rior to Sabrina's second birthday, blood tests revealed that Sherry's husband, James, could not be the father" [Appendix A-1] and its statement that "John does not dispute Sherry's statement that these blood tests conclusively establish that it was impossible for James to be the father of Sabrina." [Appendix A-2, footnote 1]

From the commencement of this proceeding, John has disputed the foundation and validity of the tests. James' "blood test" was an unsigned notation on a Sonoma County Community Blood Bank form, dated April 13, 1974 (seven years before Sabrina's birth) Sabrina's "blood test" was an unsigned notation on a Kaiser Permanente Medical Record form at the time of her birth. Sherry did not submit any evidence of her own blood type. She did not offer her "tests" into evidence. She did not explain why she had failed to comply with Evidence Code section 621 by informing the court of this blood type information within two years of Sabrina's birth.

[3] In pertinent part, the Decision states: "[3.] Nothing herein is intended to deprive Plaintiff from attempting to establish that the application of Evidence Code section 621 is unreasonable, arbitrary, capricious, and a denial of due process. [*In re Lisa R.* (1975) 13 Cal.3d 636; cf. *Michelle W. v. Ronald W.* (1985), 39 Cal.3d 354). In weighing the competing interests of the state which has an interest in providing a status of legitimacy for the minor child, and the interests of the putative father, it may well be that it would be a denial of the child's due process

E. *Formal order.* The case then returned to Judge Broderick, who found, without any evidentiary hearing, that "the application of Evidence Code section 621 in the circumstances here presented, would constitute a violation of the due process and equal protection clauses of the State and Federal Constitutions." On May 7, 1987 the trial court issued a formal order denying John's motion to dismiss the case and ordering him to submit to paternity blood tests.

F. *California appellate actions.* John filed a Petition for Writ of Mandate, but the California Court of Appeal denied the Petition without opinion. The California Supreme Court, however, granted John's Petition for Review and retransferred the matter to the Court of Appeal, with directions to issue an alternative writ.

The California Court of Appeal heard John's Petition but denied it in a published opinion filed June 17, 1988. The Court of Appeal held that the application of Evidence Code section 621 would deny Sherry due process of law.

The Court of Appeal did not discuss, or base its ruling on, the equal protection clause, nor did the Court discuss whether the statute impaired the constitutional rights of the child Sabrina. This latter omission is significant, since Judge Breiner's ruling had been expressly based on an ostensible impairment of Sabrina's constitutional rights, and not those of Sherry. The opinion of the Court of Appeal is set forth in Appendix A-1-9.[4]

G. *Depublication by California Supreme Court.* On August 25, 1988 the California Supreme Court denied John's timely

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rights to allow the application of Evidence Code section 621. That remains to be litigated."

[4] Although the order at bar is an interlocutory one, it completely resolves the constitutionality of the statute for the purposes of this proceeding. Although the Supreme Court is normally without jurisdiction to review an interlocutory judgment, jurisdiction is proper where the federal claim has been finally decided, with further proceedings in the state court to come, but in which later review of the federal issue is unavailable, regardless of the outcome of the case. [*Pennsylvania v. Ritchie* (1987) 429 U.S. 469]

petition for review. The state Supreme Court also issued an order directing the Reporter of Decisions not to publish the Court of Appeal opinion in the Official Appellate Reports. [Appendix A-10]. The effect of this order is that the Court of Appeal decision is binding only in the present case. Thus, pending a decision of this Court in *Michael H.*, Evidence Code section 621 will remain unconstitutional for only one person in the state of California: John.[5]

## REASONS FOR ALLOWANCE OF THE WRIT

The primary issue before this Court in *Michael H.* is whether Evidence Code section 621 violates the equal protection and due process clauses of the Constitution, insofar as the statute may permit the State to terminate an ongoing relationship between a putative father and a child. The constitutional issues have arisen in *Michael H.*, primarily because the statute does not afford the putative father an independent right to establish his parentage. In the present case, however, both Sherry and James had statutory remedies which they failed to utilize.

In *Michael H.*, neither the child Victoria, nor the putative father Michael, has challenged the constitutionality of Evidence Code section 621 in its entirety. Victoria specifically writes in her Brief for Appellant (p. 34) that the statute may still be constitu-

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[5] Although the state Supreme Court did not specify its reasons for striking the Court of Appeal opinion from the published reports, the common reason why the Supreme Court takes this action is because it disagrees with the result or reasoning of the decision. [See Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal. Law Rev. 514 (1984). The present California Supreme Court has placed reliance on decertification, as a means of resolving legal issues without deciding them, in the face of a heavy calendar backlog. Many scholars have criticized the increased use of this technique. [See, e.g., Uelman, *First Year Report: The Lucas Court*," California Lawyer, June 1988, p. 30] In the present instance, decertification has worked great unfairness. John is now the only person in the state of California as to whom Evidence Code section 621 is unconstitutional.

tional where, as here, a mother files a paternity action seeking to name a third party as her child's father.

In the present case Evidence Code section 621 would not terminate any ongoing relationship. Neither the accused father John, nor the child Sabrina, is seeking to establish familial bonds. Rather, it is the mother (not joined by her child) who wishes to avoid the express terms of Evidence Code section 621, so that she may change Sabrina's legal father from James to John. The apparent purpose of the mother's quest is financial: to seek child support from John, instead of James. This motivation is underscored by the fact that the only man with whom Sabrina has ever had a long-term paternal relationship in her life is James, not John. The Court of Appeal decision further disrupts this bond.

Section 621 afforded both the mother and her husband the right to file a motion for paternity blood tests within two years of the child's birth. Neither person filed such a timely motion. Instead, the mother waited until Sabrina was almost five years old to institute this challenge to her paternity.

This case therefore raises a significant constitutional question, parallel to that in *Michael H.*: does Evidence Code section 621 comport with substantive due process when its operation would not impair any person's fundamental rights and when the plaintiff had a statutory remedy which she failed to utilize?

John respectfully submits that the state Court of Appeal erred by striking down the statute. Here, the statute serves legitimate state interests, and it is constitutional because neither the child, nor the accused father, seeks to avoid its operation. The statute protects the best interests of Sabrina by precluding belated litigation over her parentage.

The proper standard of review in a case such as this one is whether a rational relationship exists between section 621 and a valid legislative purpose. When it enacted amendments in 1980 to establish a two year limitation period to rebut the conclusive presumption of paternity, the Legislature carefully considered, and weighed, the respective interests of all parties. The Court of Appeal opinion violates traditional standards of appellate review,

under which the Legislature's determination is entitled to great deference.

The issue is an especially important one, worthy of review in light of the questions which *Michael H.* poses.

A. *Evidence Code section 621 conclusively settles the issue of legal parentage.* Evidence Code section 621 applies here because Sherry meets the criteria of subsection 621 (a). She was cohabitating with her husband, who was not impotent or sterile, from well before Sabrina's conception until well after her birth. She did not comply with the requirements of subsection 621 (d): she did not file a motion for blood tests within two years of Sabrina's birth.

Having determined that Civil Code section 621 applied, the trial court should have dismissed this action.

B. *Application of Evidence Code section 621 in this case does not impair any fundamental personal rights.* Citing *In re Lisa R.* (1975) 13 Cal.3d 636 and *Stanley v. Illinois* (1972) 405 U.S. 645, the Court of Appeal opinion states that the proper standard for measuring due process challenges to Evidence Code section 621 is a weighing test, applied on a case- by-case basis. This test, however, does not apply.

The due process balancing test operates when state action would otherwise impair a fundamental personal right of a party. [See, e.g., *Parham v. Hughes* (1979) 441 U.S. 347] One fundamental right, which both *Lisa R.* and *Stanley* recognize, is the right of a natural father to maintain an established relationship with his child, in the face of the State's attempt to terminate that relationship. This right is a limited one, which may be invoked, if at all, only by a man who wants to be deemed a child's legal father, and who takes actions consistent with this desire. Absent such a situation, no Constitutional due process rights emanate.

This Court has employed the weighing test in connection with legislation which would irrebuttably bar a putative natural father from exercising parental rights with respect to a child born out of wedlock. The Courts have characterized as fundamental the right

of a natural father to the care and companionship of his child.[6] As the Court wrote in *Stanley*, quoting in part from Justice Frankfurter's concurring opinion in *Kovacs v. Cooper* (1949) 336 U.S. 77, 95:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from *shifting economic arrangements*." [emphasis added]

*Lisa R.* similarly applied a balancing test, since the issue in that case involved the right of a natural father to have a legal relationship with his child, in the face of a statute which would otherwise have acted as an absolute bar.

When a man does not seek the custody of a child, however, the same strict standard of due process simply fails to apply. Thus, for example, in *Quilloin v. Walcott* (1978) 434 U.S. 246, the Supreme Court distinguished the due process considerations enunciated in *Stanley* by writing that "this is not a case in which the unwed father had, or sought, actual or legal custody of his child."

In *Lehr v. Robertson* (1983) 463 U.S. 248, the Supreme Court again made this distinction in another case involving a claim by a natural father. The Court initially explained its ruling against the father by writing that legislative enactments in the family law area are entitled to great deference:

> In the vast majority of cases, state law determines the final outcome. [citation omitted] Rules governing the inheritance of property, adoption and child custody are generally specified in statutory enactments that vary from State to State. Moreover, equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships. The

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[6] In *Lassiter v. Department of Social Servs.* (1981) 452 U.S. 18, 27, the Court wrote that "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' "

> institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.

Although putative fathers may on occasion have constitutional due process rights, irrespective of the proscription of state statutes, this Court in *Lehr* wrote that such rights arise only when the putative father has developed a relationship with the child[7]:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

The Court of Appeal erred by applying in reverse the limited constitutional right of a putative father to the companionship of that father's child. As the opinions of the United States Supreme Court instruct, such a right arises only if a natural father seeks the parental relationship and takes demonstrable actions to develop it.[8] In the instant case, John has denied that he is the child's

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[7] Here, by contrast, John lived with Sherry and Sabrina for three months. Such a short time period does not remotely constitute a "developed relationship."

[8] In *Louden v. Olpin* (1981) 118 Cal. App. 3d 365, the California Court of Appeal considered, and rejected, a claim that the constitutional right recognized in *Stanley* can be applied *against* a natural father who wished no contact with a child. The Court of Appeal wrote: "Appellant urges us to create a reciprocal right in children to order visitation and relies on *Stanley v. Illinois* [citation omitted] for that proposition. *Stanley* recognized the constitutional right in the unwed father to his

biological father; has not asked to be designated as the child's legal father; and has not sought to establish any parental relationship.

Unfortunately, the Court of Appeal opinion would consecrate James' decision, with Sherry's concurrence, to sever his legal ties with Sabrina and to abrogate his support responsibilities. At the same time, the opinion would open the settled matter of Sabrina's parentage, and it would deprive Sabrina of the only man with whom she has ever enjoyed an ongoing legal relationship: James.

Sherry has no protected constitutional standing under the due process clause, sufficient to invalidate application of the specific provisions of Evidence Code section 621, because her parental status with the child is not in question. Sabrina has not filed any action to establish a parental relationship with John.

Accordingly, a due process weighing test is inapplicable in this case, because Evidence Code section 621 does not defeat a fundamental personal right of any party. The correct test is whether Evidence Code section 621, in its present form, withstands a rational relationship analysis.

B. *The rational relationship test applies here.* The normal test for measuring any due process challenge to social legislation, applicable in the present instance, is whether the legislation is "demonstrably arbitrary or irrational." [*Duke Power Co. v. Carolina Environmental Study Group, Inc.* (1978) 438 U.S. 59]. Under this approach, the legislation is presumed valid and must be upheld as long as it bears some rational relationship to a legitimate state function. [See, e.g., *Williamson v. Lee Optic Co.* (1955) 348 U.S. 483; *Ferguson v. Skrupa* (1963) 372 U.S. 726]

In his famous dissent in *Lochner v. New York* (1905) 195 U.S. 45, which this Court has since adopted as the better rule of substantive due process analysis, Justice Holmes wrote the following passage with respect to the rational relationship approach to a court's review of social legislation:

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natural child. The court did not decide whether the right is reciprocal in the child and such a conclusion does not naturally flow."

> [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

The Supreme Court has since invoked the rational relationship test on countless occasions to uphold various legislative enactments. [See, e.g., *Hawaii Housing Authority v. Midkiff* (1984) 467 U.S. 229; *West Coast Hotel v. Parrish* (1937) 300 U.S. 379] As Justice Stone wrote in *United States v. Carolene Products Co.* (1938) 304 U.S. 144, "where the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed, affords support for [the legislation]."

Prior to the 1980 amendments, Evidence Code section 621 operated as a conclusive presumption of paternity. The 1980 amendments have removed the irrebuttable nature of this presumption, provided that the parties meet the statutory requirement of filing a timely motion for blood tests. [See *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 995, appeal dismissed, 106 S.Ct. 774]. Nevertheless, in *Mourning v. Family Publications Services, Inc.* (1973) 411 U.S. 356, the Supreme Court even applied the rational relationship test to an irrebuttable legislative presumption which did not involve a fundamental personal right[9]:

> It is not a function of the courts to speculate as to whether the statute is wise or unwise or whether the evils sought to be remedied could have been regulated in some other manner.

The Supreme Court took the same approach in *Weinberger v. Salfi* (1975) 422 U.S. 749. Indeed, as one commentator has written, the more stringent due process balancing test is particularly unsuited to the review of conclusive legislative presumptions which do not involve fundamental rights [Note, *Constitutional*

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[9] The issue was the constitutionality of the Four Installment Rule of Regulation "Z," under the Federal Truth in Lending Act.

*Law: The Irrebuttable Presumption*, 14 Washburn Law J. 141, 145 (1975)]:

> Allowing an individualized determination for every individual affected by legislatively created conclusive presumptions, seems an administrative impossibility.

The conclusive presumption of paternity has been in existence since ancient times. At common law it was known as Lord Manfield's Rule. It was part of the Napoleonic Code. Prior to the amendments which the Legislature enacted in 1980, Evidence Code section 621 had three recognized purposes: "(1) preservation of the integrity of the family; (2) protection of the innocent child from the social stigma of illegitimacy; and (3) a desire to have an individual rather than the state assume the financial burden of supporting the child." [*In re Marriage of B.* (1981) 124 Cal. App. 3d 524]

The California Supreme Court upheld the former version of the law based on the relational relationship standard. [*Kusior v. Silver* (1960) 54 Cal.3d 603] In *Kusior*, as in the present case, a child's mother sought to deem a third party the legal father of her child, but the state Supreme Court held that the conclusive presumption barred her suit.

In 1980, following a suggestion in a law review article that a statute of limitations might be the more appropriate approach to the conclusive presumption in light of improvements in paternity blood testing, the Legislature amended Evidence Code section 621. [Recent Developments, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy* (1968) 20 Stan. L. Rev. 754; see *Estate of Cornelious* (1984) 35 Cal.3d 461, 465-466, appeal dismissed 467 U.S. 967; *In re Marriage of B.*, *supra*, 124 Cal. App. 3d 524] According to these court opinions, the primary purpose of the amendments was to give a husband or wife limited rights, under specified conditions, to rebut the conclusive presumption by presenting blood test evidence to the court within two years of the child's birth.

The Legislature manifested its express intent to place a two year limit on the time for challenging the conclusive presumption.

Thus, the Report to the state Senate Committee on Judiciary states:

> This bill would require that a challenge to the conclusive presumption of the husband's paternity of the child must be *brought* within two years after the birth of the child, after which the conclusive presumption would be applied *without exception.* (emphasis added)

Under the pertinent rational relationship test, Evidence Code section 621 is constitutional because it continues to serve valid state purposes of settling a child's parentage after two years, and of fixing the obligation to pay child support. In the present case, unlike the situation in *Michael H.*, the validity of these legitimate objectives is unaffected by any desire of the child or accused father to establish familial bonds. Sherry's untimely suit against John is barred by the limitations period set forth in the statute, and the suit should therefore be dismissed.

C. *Even if a weighing test applied, the statute would still be constitutional in this case.* For the reasons John has discussed above, the Court of Appeal should not have employed a due process balancing test, since Evidence Code section 621 does not defeat any recognized fundamental personal rights of any party. The proper approach is the rational relationship test. Nevertheless, even if a weighing test were applicable, the Court of Appeal incorrectly analyzed the essential components based upon established precedent.

1. *Interests of the State.* The interests of the state in upholding section 621 are served in three respects.

First, application of the statute serves the important interest of protecting the established status of children born of lawful marriages, after two years have passed from the date of a child's birth. James maintained continuing personal and financial contact with Sabrina until she was two years and three months old. Then, he unilaterally severed his relationship with his daughter. The state has an interest in protecting a child from such behavior.

Second, the presumption of paternity serves the state's interest in fixing the obligation of adults to support their children. Sabrina

was born when Sherry and James were married and cohabiting. Sherry listed her as their child on her birth certificate. Sherry and James acknowledged that Sabrina was their child when they filed their initial pleadings in their dissolution of marriage action. James supported Sabrina financially. Only after Sabrina was more than two years old did Sherry and James mutually take a contrary position in the stipulated divorce judgment, apparently so that James could attempt to avoid paying child support. Public policy is served by preventing belated action by parents to defeat a father's duty to support his child.[10]

Finally, the state has a valid general concern about protecting its legislative process, and the constitutionality of duly-enacted laws.

2. *Interests of Sabrina.* Children have an interest in protecting and maintaining settled relationships. Sabrina also has an interest in not having a court change her legal father, especially now that she is over seven years old. In all respects, Sabrina has an interest in the prompt termination of this challenge to her status.

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[10] Under California law parties cannot agree to the non-paternity of a child or the waiver of child support. Such agreements are considered to be contrary to fundamental public policy and therefore void *ab initio*. [*In re Marriage of Ayo* (1987) 190 Cal. App. 3d 442; *In re Marriage of Goodarzirad* (1986) 185 Cal. App. 3d 524] Thus, Sherry and James' Marital Settlement Agreement is void, to the extent that the parties purported to agree that James was not Sabrina's father and that he did not have to pay child support.

Even if the provision in the Marital Settlement Agreement stating that James is not Sabrina's natural father were valid (and it is not valid, but rather void, as discussed above) the Agreement by its very terms does not purport to change the fact that James remains Sabrina's *legal* father. Instead, the Agreement implicitly recognizes this legal relationship by stating that James would agree, upon request, to consent to Sabrina's adoption by a third party. Only a legal or presumed father can give such consent.

Sabrina has not joined with Sherry in this lawsuit, nor has she requested at any time to change her legal father from James to John.[11]

3. *Sherry*. Since Sherry's legal relationship with Sabrina is not in question, her only interest is financial. She would prefer to seek child support from John instead of her former husband James.[12] The California Supreme Court, however, has expressly

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[11] Even if Sabrina had made such a request, however, she would have no recognized constitutional right to impose a legal relationship on a man whom she believes might be her biological father. The only recognized constitutional rights, which under some circumstances may be sufficient to override a statute, are those of the natural father to custody and control of the child. [Comment, *Rebutting the Marital Presumption: A Developed Relationship Test* (1988) 88 Columbia L. Rev. 369, 377-378].

California, like most states, has a closed record policy for adoption files [Civil Code section 227 (a); See generally, Note, *Artificial Insemination: Disclosure Issues* (1979) 11 Columbia Hum. Rts. L. Rev. 87] Upon the written request of any party in an adoption, and court order, a minor adopted child may be precluded from inspecting court files to obtain the identity of his or her natural parents. If a child had a constitutionally-protected interest in knowing the identity of the biological father, this statute would be unlawful. Yet, for years the courts have upheld it as being strongly consistent with public policy. [See, e.g., *Hubbard v. Superior Court* (1961) 189 Cal. App. 2d 741]

[12] The California courts have held that legal, rather than biological paternity, is the pertinent measure of a father's rights and responsibilities. Biological parentage is irrelevant. [*Keaton v. Keaton* (1970) 7 Cal. App. 3d 214; *Vincent B. v. Joan R.* (1981) 128 Cal. App. 3d 619; *Ferguson v Ferguson* (1981) 126 Cal. App. 3d 744]. Although Sherry may wish to ascertain whether John, or some other third party, is Sabrina's biological father, such an objective is not constitutionally mandated or protected. This objective may be important to Sherry for economic and personal reasons, but it is not a basis for her to proceed in a court of law in the face of a statutory proscription.

Furthermore, any argument that a mother (or the State, as the case may be) could have a right to seek support from the biological, rather than the legal father, raises serious countervailing constitutional concerns of its own. As one commentator writes [Comment, *Rebutting the*

and correctly ruled that a purely financial interest is not constitutionally protected. [*Estate of Cornelious, supra,* 35 Cal.3d 461, appeal dismissed, 467 U.S. 967][13]

D. *The trial court's order violates the right of privacy.* Because Evidence Code section 621 bars this proceeding, any blood test evidence would be irrelevant. As such, an order compelling John to submit to tests is an unconstitutional invasion of privacy and an unreasonable search and seizure.

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*Marital Presumption: A Developed Relationship Test* (1988) 88 Columbia L. Rev. 369, 378]: "[T]here will be cases in which the husband and wife are able to support the child, while the putative father cannot, so that allowing the putative father to establish his paternity and support the child would not serve the state interest. Thus, passing an inclusive statute would be hopelessly overinclusive. Further, if the state's goal were to preserve the public fisc, the use of inclusive statutes to achieve that goal would constitute "clumsy and deliberate legislative discrimination between the rich and the poor," and could not withstand scrutiny under the equal protection clause. [quoting Justice Rehnquist's dissent in *Zablocki v. Redhail* (1978) 434 U.S. 374]

[13] The trial court alternately based its ruling on the Equal Protection Clause. The Court of Appeal did not address the argument of equal protection but instead relied exclusively on due process. Sherry has not specified how Evidence Code section 621 would deny her equal protection. John respectfully submits that no equal protection issue exists.

## CONCLUSION

The present case raises important issues, which are parallel to those in *Michael H.* Here, Evidence Code section 621 meets the governing rational relationship test, because the statute does not impair the fundamental personal rights of any party. Rather, enforcement of the statute is in the best interests of the child Sabrina, who has not joined in this challenge to her own parentage.

John respectfully submits that the Legislature is entitled to deference with respect to the scope of the 1980 amendments which it chose to enact. Sherry's suit violates the express terms of the statute.

The Court should grant the Petition for Certiorari.

DATED: October 31, 1988

MADELEINE SIMBORG
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By BERNARD N. WOLF
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In the Court of Appeal of the State of California

First Appellate District

Division Four

A039036

(Super. Ct. No. 128238 Marin County)

John Roe, Petitioner,

v.

Superior Court of the State of California,
County of Marin, Respondent;

Sherry Doe, Real Party in Interest.

Petitioner (John) challenges an order denying his motion to dismiss a paternity action against him and ordering him to submit to a blood test to determine paternity. We hold that the order is correct and deny the petition.

## PROCEDURAL HISTORY

On April 30, 1986, Sherry Doe, real party in interest herein, filed an action under the Uniform Parentage Act (Civil Code § 7000 et seq.) alleging that John is the natural father of her daughter Sabrina and asking for support. She asked that John be ordered to take a blood test and submit the results to the court. In a declaration supporting the action, Sherry stated that Sabrina was born while she was married to a man other than John. Prior to Sabrina's second birthday, blood tests revealed that Sherry's husband, James, could not be the father. The couple was divorced and the judgment of dissolution recited that James was not the father of Sabrina. The declaration then stated that John had initially supported real party and Sabrina and had held himself out as Sabrina's father.

John opposed the action contending that it was barred by the conclusive presumption of section 621 of the Evidence Code. Respondent court ordered a hearing on the question of whether John was estopped by his conduct to assert the defense of section 621; it ruled that while he was not estopped to raise the defense,

Sherry could nevertheless litigate the question of whether application of section 621 "is unreasonable, arbitrary, capricious and a denial of due process."

Sherry raised the issue of the application of section 621 by a motion to require John to submit to blood testing. He opposed the motion and moved to dismiss. The court ruled in favor of Sherry, thus precipitating the instant petition.

## FACTS

In 1974, Sherry married James. They had a daughter, Alexis, whose parentage is not in question. In 1980, Sherry and John, who had been casual acquaintances for ten years, commenced a sexual affair. (John was married at the time and had a family of three children.) When Sherry discovered she was pregnant she told John but when he asked if he was the father, according to her testimony she told him that she really didn't know.

Sabrina was born on July 30, 1981. Sherry and James separated nine months later because of Sherry's continued involvement with John. James filed for dissolution and the resulting interlocutory judgment of dissolution incorporates a Marital Settlement Agreement in which the parties agree that James is not the natural father of Sabrina. Sherry testified that this agreement was made because James had developed information that led him to believe that he was not Sabrina's father. A 1974 blood test of James determined that his blood type was AB whereas a blood test of Sabrina dated August 5, 1981, determined her blood type to be O.[1] The agreement was reached in a meeting between Sherry and James and their attorneys in August of 1983. The judgment of dissolution did not provide for child support for Sabrina as it did for Alexis.

John and Sherry lived together with her daughters at various times after James and Sherry separated. In October of 1983, John and Sherry commenced living together in a house that they

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[1] John does not dispute Sherry's statement that these blood tests conclusively establish that it was impossible for James to be the father of Sabrina.

selected together and John purchased. Although John had intended to marry Sherry, this never occurred and in March of 1985 Sherry moved to Arizona. John continued to assist her financially by sending her $2,750 per month until February of 1986. Sherry filed the present paternity action a few months thereafter.

## DISCUSSION

John now seeks to avoid submitting to blood tests and to defeat Sherry's paternity action against him by asserting the bar of the Evidence Code's conclusive presumption that Sabrina as the issue of Sherry who was cohabitating with her husband, James, is a child of that marriage.

Evidence Code section 621 provides in relevant part:

> "(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
>
> "(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
>
> "(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.
>
> "(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child."

Sherry cannot utilize subdivision (d) to avoid the conclusive presumption of section 621 since her petition to establish John's parentage was obviously not filed within two years of Sabrina's birth and did not include John's affidavit acknowledging paternity.

However, respondent court found that James had rebutted the presumption and reasoned that once the presumed father had established his nonpaternity, the conclusive presumption no longer existed and could not be relied upon by an alleged father. The court also concluded, and we agree, that application of the conclusive presumption to this case would deny Sherry due process. It is thus unnecessary for this court to determine the effect of the judgment of dissolution on the conclusive presumption of paternity.

In *In re Lisa R.* (1975) 13 Cal.3d 636, our Supreme Court, applying *Stanley v. Illinois* (1972) 405 U.S. 645, adopted a balancing test for review of due process challenges to a conclusive presumption of paternity. That test requires a case-by-case weighing of the state's interest in maintaining the presumption against the competing private interests in rebutting it. (*In re Lisa R., supra*, 13 Cal.3d at pp. 648, 651, fn. 17.) In the *Lisa R.* case, Lisa, a two-year-old child, had been adjudged a dependent ward of the court. Her mother was an alcoholic; her mother's husband was a drug addict. (*Id.*, at p. 640.) Lisa lived with various foster parents. At a status review when Lisa was five and both her mother and the presumed father were dead, a man claiming to be Lisa's biological father sought to prove that fact. The trial court refused him permission due to the conclusive presumption that Lisa was the legitimate issue of the marriage of her mother and the presumed father. In focusing first on the rights of the putative father, the court noted the type of relationship which the man had had with Lisa's mother, the fact that he had asserted his rights when he first discovered Lisa was a dependent ward of the court and the fact that he had no alternative remedy by which to protect his interests. The court then enumerated the state's potential interests—accomplishing the purposes of the Juvenile Court Law, relieving a child of the stigma of illegitimacy, promoting marriage, speed and efficiency of judicial inquiry—and found that none of them outweighed the father's interests.

Our attention is called to two cases subsequent to *In re Lisa R.*, in which the balancing test has resulted in application of the conclusive presumption. In *Estate of Cornelious* (1984) 35 Cal.3d 461, an adult claimed to be a decedent's illegitimate

daughter and petitioned the trial court for appointment as administratrix of his estate. The trial court applied the conclusive presumption and the Supreme Court affirmed. The court held that the woman's interest in proving that decedent was her biological father did not outweigh the state's interest in preventing her from rebutting the presumption. The woman's interest was solely her hope of gaining a right to inherit since there was no possibility of an ongoing relationship with the biological father. On the other hand, the court viewed the state's interest as substantial since the policies promoted by the conclusive presumption of legitimacy were served by the application of the presumption. The woman had been reared and supported by her presumed father who died thinking he was her natural father. "Her equities are simply not in the same class as those of the fathers in *Stanley* and *Lisa R.*" (*Estate of Cornelious, supra*, 35 Cal.3d at p. 467.)

In *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, a child and her stepfather, Donald, brought an action seeking to prove that he was the child's biological father. Michelle was born during her mother Judith's marriage to Ronald. The marriage was dissolved when Michelle was five years old. The issue of paternity was not raised and Ronald agreed to pay child support, and he regularly exercised visitation rights. However, when Michelle was six, Judith married Donald and refused to allow Ronald to continue visiting Michelle. About a year later, Donald and Michelle brought an action to establish Donald's paternity. The trial court applied section 621 and held that Ronald was conclusively presumed to be Michelle's father. The Supreme Court balanced the interests of Michelle and Donald against the state interests and concluded that the presumption should be applied. First, the court noted that unlike the challengers in both *Stanley* and *Lisa R.*, the putative father was not attempting to establish a legal relationship with a child who otherwise had no parents. The court then ruled that Donald's interest was overruled by the social policies upholding the integrity of the family and protecting the child's welfare. (*Michelle W. v. Ronald W., supra*, 39 Cal.3d at p. 362.) The

court viewed the child's interest under the circumstances of the case before it as no greater than those of the putative father.[2]

The interest of real party in the case at hand is to establish the parentage of her child and to secure support from the biological father. To that extent she represents the interests of Sabrina. (See *Perez v. Singh* (1971) 21 Cal. App. 3d 870, 872.) She could not realistically have moved to protect these interests by an action during the period or by the means provided to her by section 621. Obviously, she could not have obtained an affidavit from the putative father, John, who is contesting his parentage. She cooperated with her husband, James, to establish the biological parentage of Sabrina by recognizing in the Marital Settlement Agreement that James was not Sabrina's biological father. The interest of Sherry and Sabrina in determining parentage and obtaining support is substantial; contrasted therewith is the interest of John which unlike that of the putative fathers in the cases discussed above, is one of avoiding paternal responsibilities.

Nevertheless, it is the interest of the state that is to be balanced against the interers of those who challenge the conclusive presumption. The most significant interest of the state in upholding the conclusive presumption is the integrity of the family. This interest has been recognized even in the face of the death of the presumed father where that presumed father had a long-standing and firmly established relationship as in *Estate of Cornelious, supra*, 35 Cal.3d 461. That interest is much weaker in this case

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[2] The most recent case cited is also a case in which a putative father sought to establish his paternity. (*Michael H. v. Gerald D.* (1987) 191 Cal.App.3d 995.) The child cross-complained to establish a legal or defacto/psychological parent-child relationship with either the presumed or the putative father. The child had lived with both the presumed and the putative fathers but at the time of the appeal, the mother, presumed father and child were living together as a family. (*Id.*, at p. 1002.) The court held that the interest of the putative father was outweighed by the interest of the state in upholding the integrity of the family. The court also concluded that, given the facts of the case, the welfare of the child would be harmed, not protected, if she were permitted to rebut the conclusive presumption of legitimacy. The United States Supreme Court granted review on February 29, 1988.

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than in *Cornelious* or *Michelle W.* The relationship of James and Sabrina was shortlived since, before Sabrina was two years old, James had filed for dissolution and during that proceeding had taken steps to refute the conclusive presumption of paternity. Unlike the case of *Michelle W.*, there is no presumed father ready to assume parental responsibilities.

The other significant state interest is protection of the child's welfare. (*Michelle W. v. Ronald W., supra*, 39 Cal.3d at p. 362) In *Michelle W.*, the court rejected the argument that the "stigma" of illegitimacy should be considered in view of the "Uniform Parentage Act" (Civ. Code, § 7000 et seq.) which abolished the concept of illegitimacy. (39 Cal.3d at p. 362, fn. 5) The welfare of Sabrina could only be served by determining her biological father and obtaining support. Without such a determination, she would either be left with no father or with further litigation to collaterally attack the determination of nonpaternity in the judgment dissolving the marriage of her mother and James.

We hold that the interests of Sherry and Sabrina in establishing biological parentage outweigh the interests of the state in enforcing the conclusive presumption. It thus would be a denial of due process to preclude this action on the ground of the conclusive presumption.

The alternative writ is discharged and the petition is denied.

CERTIFIED FOR PUBLICATION

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Anderson, P.J.

We concur:

_____

Poche, J.

_____

Channell, J.

| | |
|---|---|
| Trial Court: | Marin County Superior Court |
| Trial Judge: | Henry Broderick |
| Counsel for Petitioner: | Madeleine Simborg, Esq.<br>Nancy C. DeMis, Esq.<br>Diamond, Bennington & Simborg<br>300 Tamal Plaza, Suite 280<br>Corte Madera, CA 94925<br><br>Bernard Wolf, Esq.<br>Dowgialo & Wolf<br>595 Market St., Suite 1900<br>San Francisco, CA 94105-2880 |
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Order Denying Review

After Judgment by the Court of Appeal

1st District, Division 4, No. A039036
S002717

In the Supreme Court of the State of California

In Bank

John Roe, Petitioner,

v.

Superior Court of the County of Marin, Respondent;
Sherry Doe, Real Party in Interest.

Petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed June 17, 1988. (Cal. Const., Art. VI, section 14; Rule 976, Cal. Rules of Court.)

LUCAS,
Chief Justice